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No. 09-1104

Supreme Court, U S
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In The Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN, ERIK PALACIO, ANDRE BRUNA, SEAN VISNERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO OPPOSITIONS TO CERTIORARI FROM RESPONDENTS KOBAYASHI, GOLDSTEIN, PALACIO, BRUNA, AND VISNERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT AMONG THE CIRCUITS, AN APPARENT CONFLICT WITH A PRIOR DECISION OF THIS COURT, AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER THERE IS A BLANKET EXCEPTION TO THE KNOCK AND ANNOUNCE REQUIREMENT WHEN THE POLICE HAVE REASON TO BELIEVE THAT A WEAPON IS LAWFULLY PRESENT IN A DWELLING WHERE A SEARCH IS TO OCCUR 1

A. The Respondents' Presentations of Facts Are Unsupported by the Record and Inconsistent with the Principle that on Summary Judgment Facts Are Construed in Favor of the Non-Moving Party 1

B. The Court of Appeals Decision that a No-Knock Entry is Reasonable When There Is Reason to Believe that Drugs and Weapons Are Present Raises an Important Issue for Review By this Court 3

C. There Is a Conflict Among the Circuits on the Issue of Whether Suspicion of the Presence of Drugs and Weapons Makes it Reasonable for Police to Enter a Dwelling Without First Knocking and Announcing ... 7

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 3

Atanus v. Perry, 520 F.3d 662 (7th Cir. 2008) 3

Caiozzo v. Koreman, 581 F.3d 63 (2d Cir. 2009) 3

Hernandez v. Conde, 272 Fed. Appx. 663 (10th Cir. 2008) 8

Jones v. Wilhelm, 425 F.3d 455 (7th Cir. 2005) 8, 9

Michigan v. Fisher, 130 S.Ct. 546 (2009) 3

Molina ex rel. Molina v. Cooper, 325 F.3d 963 (7th Cir. 2003) 8

Richards v. Wisconsin, 520 U.S. 385 (1997) 5, 9

Sledd v. Lindsay, 102 F.3d 282 (7th Cir. 1996) 7

United States v. Lucht, 18 F.3d 541 (8th Cir. 1994) 8

United States v. Marts, 986 F.2d 1216 (8th Cir. 1993) 8

United States v. Nabors, 901 F.2d 1351 (6th Cir. 1990) 8

Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998) 7

STATUTES

18 U.S.C. §3109 8

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT AMONG THE CIRCUITS, AN APPARENT CONFLICT WITH A PRIOR DECISION OF THIS COURT, AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER THERE IS A BLANKET EXCEPTION TO THE KNOCK AND ANNOUNCE REQUIREMENT WHEN THE POLICE HAVE REASON TO BELIEVE THAT A WEAPON IS LAWFULLY PRESENT IN A DWELLING WHERE A SEARCH IS TO OCCUR.

A. The Respondents' Presentations of Facts Are Unsupported by the Record and Inconsistent with the Principle that on Summary Judgment Facts Are Construed in Favor of the Non-Moving Party.

The procedural posture of this case is an interlocutory appeal of the District Court's denial of the defendants' motion for summary judgment on the grounds of qualified immunity. The District Court found important issues of fact to be resolved by the jury, especially whether the police knocked and announced before entering the house of Anthony Diotaiuto and then shooting and killing him. The District Court explained that "a material dispute of fact exists as to whether [the defendants] knocked and announced before entering." (App. E-8 to Petition for Writ of Certiorari).

All of the respondents in their oppositions to certiorari present their version of the facts as if they

were established and true. They convert their allegations, which are vehemently disputed by the petitioner, into proven facts. For example, the District Court accurately states: "According to police allegations, Diotaiuto was a known drug dealer." (App. E-3). But respondents Bruna and Visners declare that was "a well-known drug dealer." (Brief in Opposition to Petition for Writ of Certiorari of Respondents Bruna and Visners at 1). They say that Diotaiuto "frequently used illegal drugs and also sold large quantities of illegal drugs from his house in excess of felony limits." (Id.) But this is the respondents' allegation; it is disputed and not established in the record. The warrant was to arrest him, but respondents present the facts as if he were convicted.

Most importantly, respondents present their version of what occurred on the morning of August 5, 2005, as if it were established truth. They assert that "Sgt. Daniel Kobayashi, the team leader, knocked and announced that the Sunrise Police were there to serve a search warrant." (Id. at 5). But this is exactly the issue on which the District Court found that there was a conflict of evidence and therefore a matter upon which summary judgment was inappropriate. The District Court noted that "[p]laintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour in the morning, and if such a knock and announce occurred, they would have heard it. The Court agreed that the Plaintiff has advanced sufficient evidence to create a

triable issue of material fact." (App. E-9). There is likewise a dispute between respondents and petitioner over what occurred when the police entered the house that morning.

The attempt by respondents to present their versions of the facts as if they were proven and established is inconsistent with the basic principle that courts of appeals are to review a district court's grant of summary judgment de novo, construing all facts in favor of the non-moving party. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Caiozzo v. Koreman,* 581 F.3d 63, 68 (2d Cir. 2009); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008).

Indeed, the dispute over facts between petitioners and respondent point to the central issue presented by this case: Should the Court of Appeals have overruled the District Court's denial of the defendants' motion for summary judgment? *See, e.g., Michigan v. Fisher*, 130 S.Ct. 546, 552 (2009) (Stevens, J., dissenting) (urging deference to trial courts on a "close question of the reasonableness of an officer's actions.")

B. The Court of Appeals Decision that a No-Knock Entry is Reasonable When There Is Reason to Believe that Drugs and Weapons Are Present Raises an Important Issue for Review By this Court.

The United States Court of Appeals for the Eleventh Circuit reversed the District Court by concluding that it was irrelevant whether the police

knocked and announced because a reasonable officer could "suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry." (Respondents' Goldstein and Palacio Brief in Opposition at 7.) Specifically, the Eleventh Circuit found that a no-knock entry was justified based on: (1) Diotaiuto receiving and selling narcotics at his residence; (2) Diotauito's criminal history; (3) Diotauito's carrying a semi-automatic handgun on his person; and (4) Diotauito's possessing a shotgun in his bedroom. (App. B-8).

In other words, the Court of Appeals said that because police reasonably believed that there were drugs and weapons present they acted reasonably when they entered without knocking and announcing first. The Court of Appeals said this explicitly when it observed that it has "repeatedly noted the dangerous and often violent, combination of drugs and firearms." (App. B-7). For this reason, the Court of Appeals said that it was "irrelevant" whether the police knocked and announced before entering. (App. B-7 at n.1).

In looking at the four factors identified by the Court of Appeals it is crucial to note that they are all about the presence of drugs and weapons in the home. As for the second factor, the prior criminal history, it was a non-violent marijuana possession misdemeanor seven years earlier when Diotaiuto was 16 years old. As for the third and fourth factors, the possession of a handgun and a shotgun, the most important fact is one denied by none of the respondents: Diotaiuto's ownership was entirely lawful. He had a

properly licensed handgun and a shotgun (which did not require a license).

Thus, this case clearly presents the issue of whether police are acting reasonably in entering a dwelling without knocking and announcing based on their belief that drugs and weapons are present. This is an issue not yet explicitly addressed by this Court, but that arises constantly.

In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that the suspected presence of drugs does not justify entry of a dwelling without knocking and announcing. This case poses the question of whether a person permanently loses the protection of the Fourth Amendment's knock and announce requirement by exercising his or her Second Amendment right to own a firearm. Under the Eleventh Circuit's reasoning, any time police have reason to believe that there are drugs and weapons, they can enter without knocking and announcing. Although respondents claim that the Eleventh Circuit did not create a blanket exception but ruled on this case, its reasoning means that police can enter without knocking and announcing any time they believe that there are drugs and weapons present. This turns exercise of one's Second Amendment rights into a permanent waiver of a Fourth Amendment right. This Court should grant review to decide this important issue.

Respondents argue that the police acted reasonably in these circumstances because this was a "high

risk" situation. (Opp. Cert. of Respondents Bruna and Visners at 4; Opp. Cert. of Respondent Daniel Kobayashi at 2). But the only thing that made it high risk was the belief that drugs and weapons were present. In fact, the evidence in the record of this case shows that Sunrise Police Department's Vice, Intelligence and Narcotics Unit qualifies all of their entries to be "high risk." (Testimony of Anthony Bennett, Sunrise police officer, p. 32, lines 3-13.)

Respondents repeatedly emphasize that the Court of Appeals found that there was "arguable reasonable suspicion" (Opp. Cert. of Respondent Daniel Kobayashi at 4) and that thus qualified immunity was justified (Opp. Cert. of Respondents Goldstein and Palacio at 13). Of course, this is what the Court of Appeals held. But the issue in this case is whether it was reasonable for police to dispense with the knock and announce requirement solely based on the belief that there were drugs and weapons present. Whether this is phrased as "arguable reasonable suspicion" or "reasonableness" or "qualified immunity," the question is the same: under clearly established law, can the police enter a dwelling without knocking and announcing based on the belief that drugs and weapons are present? The Court of Appeals reversal of the district court was solely based on its conclusion that knock and announce is not required under these circumstances and that is the issue which this Court needs to resolve.

Quite importantly, respondents all ignore a crucial fact: everything that justifies an entry without

knocking and announcing was known to the police at the time that they obtained the warrant to enter Diotaiuto's home. Yet, they did not ask for or receive a "no knock warrant." The police knew when they requested and received the warrant that Diotaiuto had a prior misdemeanor conviction for marijuana possession, that they suspected him of having drugs, and that he lawfully owned weapons. But the police did not request a no-knock warrant. The issue is whether under these circumstances it is then reasonable for the police to enter without knocking and announcing. Petitioner urges this Court to grant review to clarify that it is clearly established that a no-knock entrance is not permissible under these circumstances and that the Court of Appeals erred in reversing the District Court and ordering dismissal of this lawsuit based on qualified immunity.

C. There Is a Conflict Among the Circuits on the Issue of Whether Suspicion of the Presence of Drugs and Weapons Makes it Reasonable for Police to Enter a Dwelling Without First Knocking and Announcing.

A number of other Circuits have found that there was a triable issue of fact in cases presenting exactly the issue that was to go to the jury in this case: whether police knocked and announced before entering a dwelling. *See, e.g., Vathekan v. Prince George's County*, 154 F.3d 173, 180 (4th Cir. 1998); *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996). The

Eleventh Circuit's ruling is in conflict with these decisions.

More importantly, a number of Circuits have ruled that the presence of drugs and weapons does not justify the police in entering a dwelling without knocking and announcing. *See, e.g., Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008); *Molina ex rel. Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003); *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994); *United States v. Marts*, 986 F.2d 1216 (8th Cir. 1993); *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990).

Respondents attempt to distinguish these cases on various grounds, such as that some of the cases involved suppression of evidence or the federal knock and announce statute (18 U.S.C. §3109). (Opp. Cert. of Respondents Bruna and Visners at 20-21; Opp. Cert. of Respondents Goldstein and Palacio at 11). But this misses the point: a number of Circuits have held, albeit in varying contexts, that police cannot dispense with the knock and announce requirement based solely on the belief that there are drugs and weapons. The Eleventh Circuit's ruling in this case is directly in conflict with these holdings.

Moreover, other Circuits have held in cases with the same procedural posture and remarkably similar facts that police officers do not act reasonably when they enter without knocking and announcing first. For example, *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), the court rejected the officers' claim that the

knock and announce requirement should be "excused on the basis of exigent circumstances in executing a search warrant at night on a suspected drug operation." Id. at 468. The Seventh Circuit emphasized that the warrant did not support a no-knock entry under those circumstances. There seems little doubt that this case would have come out differently if only it had been litigated in the Seventh Circuit.

All of these cases confirm the obvious: the issue often arises when police have to enter a home to execute a warrant and have the belief that there are drugs and weapons. The question for this Court to resolve is one seemingly decided by *Richards v. Wisconsin*: is this enough to justify entering without knocking and announcing?

CONCLUSION

Throughout their oppositions to certiorari, respondents attempt to demonize Anthony Diotaiuto by repeating innuendo and by asserting allegations nowhere supported in the record. Respondents present their version of the facts of what occurred on August 5, 2005, as if they were found by a jury or a trial court as opposed to merely asserted.

But the reality is that the police entered Diotaiuto's house at 6:00 a.m., where he was asleep in his boxer shorts. A few minutes later Diotaiuto had been shot 25 times by the police and killed.

Petitioner maintains that if the police had knocked and announced before entering, as this Court has required, none of his would have happened. Diotaiuto was startled by a large number of intruders coming into his home, as anyone would have been, and would have reacted very differently if only the police had knocked and announced first.

The District Court ruled that it was for the jury to decide whether the police had knocked and announced and whether they acted reasonably under the circumstances. The Court of Appeals reversed and said that the police acted reasonably, and thus were protected by qualified immunity, because they had reason to believe that drugs and weapons were present. This Court should grant review to decide whether those facts are sufficient to dispense with the knock and announce requirement.

Respectfully submitted,

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